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In the Supreme Court of the United States

OCTOBER TERM, 1984

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the magistrate erred in requiring the United States Marshals Service to transport state prisoners to the federal courthouse to testify in an action brought by one of the state prisoners against county officials under 42 U.S.C. 1983.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-45a) is reported at 737 F.2d 1283. The opinions of the magistrate (Pet. App. 46a-64a; J.A. 22a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on June 27, 1984. The petition for a writ of certiorari was filed on September 24, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2241 provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (5) It is necessary to bring him into court to testify or for trial.

2. 28 U.S.C. 2243 provides in pertinent part:

> The writ * * * shall be directed to the person having custody of the person detained.
>
> * * * * *
>
> [The] person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

3. 28 U.S.C. 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

4. 28 U.S.C. 567 provides in pertinent part:

> Under regulations prescribed by the Attorney General, each United States marshal shall be allowed—
>
> (2) the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards * * *.

5. 28 U.S.C. 569 provides in pertinent part:

> (a) The United States marshal of each district is the marshal of the district court * * * and may, in the discretion of the respective courts, be required to attend any session of court.
>
> (b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, * * * and command all necessary assistance to execute their duties.

(c) The Attorney General shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys. Each marshal shall report his official proceedings, receipts and disbursements and the condition of his office as the Attorney General directs.

STATEMENT

1. In June 1980, Richard Garland brought suit under 42 U.S.C. 1983 against various Philadelphia County officials in the United States District Court for the Eastern District of Pennsylvania. In his complaint, Garland alleged that, while in state custody on April 23, 1980, he had been beaten and harassed by the defendant deputy sheriffs and prison guards because he was a member of the John Africa MOVE organization in Philadelphia. Garland contended that the alleged incidents violated his constitutional rights, and he sought $3 million in damages. See J.A. 9a-19a.

With the consent of the parties, the district court assigned the action to a magistrate for disposition on the merits pursuant to 28 U.S.C. 636(c)(1). See J.A. 22a n.1. The magistrate granted Garland's application to proceed in forma pauperis (see J.A. 20a-21a; Order of June 18, 1980).

2. At the time this lawsuit was initiated, Garland was confined in the Philadelphia County jail; petitioner Pennsylvania Bureau of Correction subsequently transferred him to a state prison. See Pet. Br. 6 n.2. In 1981, the magistrate ordered that the warden of the state facility produce Garland in court for conferences in the case (see Orders of Jan. 28 and Mar. 16, 1981), and petitioner intervened to argue that the United States Marshals Service rather than the State must bear the responsibility for producing Garland in court (see C.A. App. 12-22).

In December 1982, the magistrate, acting upon Garland's petition (see C.A. App. 23-38), granted writs of habeas corpus ad testificandum for the production at trial

of Garland and four other state prisoners whom Garland identified as proposed witnesses (see J.A. 22a-41a). The writs were addressed to the state custodians of these prisoners and to the United States Marshal; they required that the state prison officials transport the five state inmates from their institutions of confinement to the county jail nearest the federal courthouse in Philadelphia and that the United States Marshal transport the inmates from the county jail to the federal court and maintain custody of them during the trial (*id.* at 35a, 36a-41a).

The Marshal intervened and moved for reconsideration of that portion of the magistrate's order that directed him to transport the state prisoners from the county jail to the federal courthouse and guard them during trial (see C.A. App. 50-58). On February 10, 1983, the magistrate denied the motion to reconsider (Pet. App. 46a-65a). The magistrate acknowledged that the historical practice in the Eastern District of Pennsylvania was that the Marshal was not responsible for the transportation of state prisoners in connection with private civil rights actions (*id.* at 48a, 50a-51a, 56a, 58a). Nevertheless, the magistrate concluded that 28 U.S.C. 569(b) authorized him, in issuing a writ of habeas corpus ad testificandum, to require the Marshal to take custody over state prisoners outside the federal courthouse and to transport them to court (Pet. App. 51a-65a).

3. On the Marshal's appeal from the denial of reconsideration,[1] the court of appeals reversed in part and affirmed in part (Pet. App. 4a-45a).[2] Relying on its

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[1] Petitioner did not appeal the portion of the magistrate's order requiring it to transport the state inmates from prison to the local jail.

[2] Because the case had been referred to the magistrate for trial by the consent of the parties, appellate review lay directly in the court of appeals rather than in the district court. See 28 U.S.C. 636(c)(3). Since the magistrate's order to the United States Marshal was collateral to the merits of the underlying civil rights

earlier decision in *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982), the court of appeals held that district courts (and therefore magistrates) have no general statutory authority to impose upon a non-custodian the obligation to produce a prisoner in court pursuant to a writ of habeas corpus ad testificandum, and thus the Marshal cannot ordinarily be required to transport state prisoners from state or county facilities to the federal courthouse. It also held that, as part of his responsibility for courthouse security, the Marshal could be ordered to take custody over state prisoners while they are in the federal court. Finally, the court of appeals held that, incident to that security responsibility, the Marshal could be directed to take custody of state prisoners outside the federal courthouse and transport them to court if the trial judge "makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal courthouse" (Pet. App. 22a-23a). Since there was no general statutory authority to require the Marshal to transport state prisoners, and since the magistrate had made no finding of special security circumstances in this case, the court of appeals reversed the magistrate's order insofar as it obligated

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action and fully and finally disposed of the issue concerning transportation of the state prisoners, the court of appeals held that it had jurisdiction over the appeal pursuant to the collateral order doctrine (Pet. App. 8a-9a). Accord *United States Marshals Service* v. *Means*, 724 F.2d 642, 644-645 (1983), on reh'g en banc, 741 F.2d 1053, 1055 (8th Cir. 1984); *Wiggins* v. *County of Alameda*, 717 F.2d 466, 467-468 (9th Cir. 1983), cert. denied *sub nom. California Dep't of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984); *Story* v. *Robinson*, 689 F.2d 1176, 1177-1178 (3d Cir. 1982); *Ford* v. *Carballo*, 577 F.2d 404, 405 (7th Cir. 1978); *Ballard* v. *Spradley*, 557 F.2d 476, 479 (5th Cir. 1977).

We are advised that further proceedings on Garland's civil rights action have been stayed pending resolution of the issue of compliance with the writs of habeas corpus ad testificandum.

the Marshal to assume custody of the state prisoners outside the courthouse and transport them to court.[3]

SUMMARY OF ARGUMENT

Under settled principles, it is the obligation of the custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum. Such was the custodian's duty at common law, and it is continued by the express terms of the federal habeas corpus statute. Where a district court properly concludes that the burden and security problems involved in the production are outweighed by the need for a prisoner's appearance, the custodian must comply with the writ by bringing the prisoner to court. This responsibility is justified by the public duty—borne by all in furtherance of the overriding societal interest in an effective system of justice—to provide evidence in one's possession regardless of expense or inconvenience.

Without disputing these principles, petitioner contends that the magistrate has authority to relieve it of the custodian's traditional obligation of production and to shift that responsibility to the United States Marshals Service. However, the federal government is a stranger to this litigation; it does not have custody of the prisoners and is not involved in the underlying civil rights action in which the prisoners' testimony is sought. There is no basis to impose upon the United States the duty to assist the State in transporting state prisoners in connection with a lawsuit under 42 U.S.C. 1983 against officials of a county of the State for acts done under color of state law.

In effect, petitioner's argument is an attempt to exploit the "deep pocket" of the United States. The issue raised presents a controversy between the State and the federal government over the operation of the Marshals

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[3] The Marshal has not cross-petitioned on the security issues, and therefore those issues are not before the Court.

Service and the expenditure of federal funds for the transportation of state prisoners. In light of principles of federal sovereign immunity and separation of powers, the requisite authority for the order sought by petitioner must be clearly expressed before a court may grant such relief against the Executive Branch.

Contrary to petitioner's contention, the All Writs Act does not authorize the magistrate to require the Marshal rather than the state custodian to transport state prisoners in this case. The Act allows a court to utilize a writ not provided for by statute if its issuance is necessary or appropriate to the exercise of the court's jurisdiction and agreeable with the principles and usages of law. As illustrated by the cases upon which petitioner relies, the Act is a residual source of authority for courts to fill in procedural interstices not covered by specific provisions. Where a legal rule or doctrine specifically addresses the matter, however, it is controlling, and the general All Writs Act cannot be used to circumvent or contravene otherwise applicable legal requirements. This limitation is especially appropriate here, since the Judiciary Act of 1789 codified in the same section the ad testificandum writ and the all writs provision for "other writs not specially provided for by statute." Because the writ of habeas corpus ad testificandum constitutes the established means for obtaining the presence of a prisoner in court, the All Writs Act is not properly invoked in this case to displace that traditional form of process.

Likewise, the statute governing the Marshals Service does not authorize the magistrate to direct the Marshal to undertake the transportation of state prisoners. Neither the section providing for the Marshal to execute lawful judicial process, nor the section allowing the Marshal to use appropriated federal funds for transporting prisoners, is applicable here. Those provisions do not themselves confer authority on the courts to compel the Marshal to act, but rather come into play

only where there is an independent source of such authority. In the absence of some other legal basis for imposing the transportation duty on the Marshal, these provisions are inapposite and do not support the magistrate's order. Indeed, the Marshals Service, in its regulations and operating manuals, has specifically concluded that the state and not the Marshal is responsible for the production of state prisoners in the circumstances of this case, and the Service's interpretation of its own authority should be given substantial deference.

Accordingly, the obligation to produce the requested state prisoners in court rests on petitioner as their custodian and cannot be shifted to the Marshal. However, while the expenses of complying with this obligation would fall on petitioner in the first instance, it is possible that the parties to the underlying civil rights action may be required to provide reimbursement to petitioner for those expenses. Although resolution of this issue is not necessary for the Court's disposition of the question presented here, we outline our preliminary analysis of this matter to make clear that rejection of petitioner's position does not mean that it will ultimately have to bear the costs of production.

ARGUMENT

PETITIONER'S OBLIGATION AS THE CUSTODIAN TO PRODUCE STATE PRISONERS IN COURT PURSUANT TO A WRIT OF HABEAS CORPUS AD TESTIFICANDUM CANNOT BE SHIFTED TO THE UNITED STATES MARSHALS SERVICE

The issue in this case is whether the United States Marshals Service can be required to transport state prisoners to court pursuant to a writ of habeas corpus ad testificandum in an action under 42 U.S.C. 1983. Relying on the fact that it is not a party to the underlying civil rights suit, petitioner contends that the magistrate has authority to relieve it of the traditional respon-

sibility of a custodian for producing its prisoners in court and to impose that obligation on the federal government rather than the State.

However, the duty of bringing prisoners to court pursuant to the writ ad testificandum devolves upon the custodian not because of its relation to the lawsuit in which the prisoners' testimony is sought, but because of its control over those in its confinement. The fact that State officials are not parties to the litigation does not detract from the established requirement that the State custodian comply with the ad testificandum writ. Contrary to petitioner's formulation, analysis of the question presented in this case does not depend upon the fortuity that a State official is a party.[4]

Nor is it correct that the State is, as petitioner seeks to portray it, a stranger to the underlying Section 1983 action. That litigation concerns charges by a state prisoner against officials of a county of the State for acts done under color of state law. Moreover, the State has a penal interest in the continued incarceration of the plaintiff and those of his witnesses who are state prisoners. Although state officials are not party defendants, the State can scarcely be considered to be a disinterested and remote bystander.

Rather, it is the United States that is the true stranger to the proceeding. The federal government neither is the custodian of the prisoners in question nor has any involvement in the civil rights suit. Its only relation to this case is that the plaintiff filed his complaint in federal court. But the action could equally well have been brought in state court (see *Maine* v. *Thiboutot*, 448

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[4] Moreover, in a number of cases involving this issue, state officials in fact were defendants in the civil rights action. See *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982); *Ford* v. *Carballo*, 577 F.2d 404 (7th Cir. 1978); *Ballard* v. *Spradley*, 557 F.2d 476 (5th Cir. 1977).

U.S. 1, 3 n.1 (1980)), in which event it would be frivolous to argue that the United States has any obligation to participate in transporting state prisoners. That Congress has provided a forum for the resolution of disputes under 42 U.S.C. 1983 should hardly subject the United States to the duty of assisting the State in transporting state prisoners in connection with a lawsuit to which the federal government is not a party. The obligation to produce its prisoners in court pursuant to the ad testificandum writ rests on petitioner as the custodian, not on the United States Marshals Service.

A. As The Custodian, The State Is Required To Produce A State Prisoner In Court Pursuant To A Writ Of Habeas Corpus Ad Testificandum

As the Court has recognized, habeas corpus encompasses a number of different forms of writs that each serve a specific function. See *Carbo* v. *United States*, 364 U.S. 611, 614-615 (1961); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95-98 (1807) (Marshall, C.J.). Involved in this case is the writ of habeas corpus ad testificandum —literally, "you have the body to testify." *Black's Law Dictionary* 639 (5th ed. 1979).

At common law, the writ of habeas corpus ad testificandum was used " 'to remove a prisoner, in order to * * * bear testimony, in any court * * *.' " *Ex parte Bollman*, 8 U.S. (4 Cranch) at 98, quoting 3 W. Blackstone, *Commentaries* *129. "This writ is a command of the court directing the person having custody of the person to bring the prisoner before the court for the purpose of testifying." 4A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 30.56, at 30-82 to 30-83 (2d ed. 1983) (footnote omitted); see also, *e.g.*, *Gilmore* v. *United States*, 129 F.2d 199, 202 (10th Cir.), cert. denied, 317 U.S. 631 (1942) ("[i]ts object is to direct the custodian of a desired witness who is incarcerated to bring such witness into court to give testimony").

The purpose of this common law writ was

> analogous to that sought to be attained by directing a subpoena duces tecum to the custodian of an evidential document * * *. "If the desired witness is confined in jail * * * [, however,] a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him. Accordingly a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony."

In re Thaw, 166 F. 71, 74-75 (3d Cir. 1908); see also 8 *Wigmore on Evidence* § 2199 (McNaughton rev. ed. 1961).

The common law writ of habeas corpus ad testificandum was codified in Section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 81-82, which provided for issuance of the writ with respect "to prisoners in gaol * * * where they * * * are necessary to be brought into court to testify." See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 94, 99; *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Statutory authorization for the ad testificandum writ has existed since that time, and the current habeas corpus statute provides that the writ shall "extend to a prisoner * * * [where i]t is necessary to bring him into court to testify * * *." 28 U.S.C. 2241(c)(5). See *United States* v. *Mauro*, 436 U.S. 340, 357 (1978); *Barber* v. *Page*, 390 U.S. 719, 724 (1968).

In line with its common law antecedents, the habeas corpus statute states that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. 2243. In addition, it specifically provides that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." *Ibid.* Thus, the plain language of the habeas corpus statute recognizes the mandatory and nondelegable duty of the custodian to bring its prisoners to court. See also Fed. R. Civ. P. 81(a)(2) ("[t]he writ of habeas corpus * * * shall be directed to the person having custody of the person detained * * *");

Fed. R. Crim. P. 15(b) (with respect to a deposition in a criminal case, "[t]he officer having custody of a defendant shall * * * produce him at the examination * * *").[5]

Issuance of a writ of habeas corpus ad testificandum is in the discretion of the trial court. See, *e.g.*, *Pollard* v. *White*, 738 F.2d 1124, 1125 (11th Cir. 1984), cert. denied, No. 84-5420 (Jan. 7, 1985); *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 246 (5th Cir. 1984); *Jerry* v. *Francisco*, 632 F.2d 252, 255-256 (3d Cir. 1980); see also *Price* v. *Johnston*, 334 U.S. 266, 284-285 (1948). As these cases indicate, among the factors to be considered are the relevance and importance of the testimony to the litigation, the necessity to present the evidence in the form of live testimony rather than through an alternative method such as deposition or affidavit, and the expense, inconvenience, and possible danger or security risk that would be involved in transporting and guarding the prisoner. A writ ad testificandum will not be issued for prisoners whose presence would be unduly burdensome or dangerous, whose evidence would not be significant to the resolution of the lawsuit, or whose testimony would be cumulative and repetitive.[6]

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[5] As the 1974 advisory committee note to Fed. R. Crim. P. 15 explains:

> In [Rule 15(b)] reference is made to the defendant in custody. If he is in state custody, a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) may be required to accomplish his presence.

See also Fed. R. Crim. P. 15(c) and 1974 advisory committee note (in deposition by government or indigent defendant, government may be ordered to pay expense of travel and subsistence for a defendant *not* in custody and his attorney).

[6] In a related context, the Court has noted that bringing a prisoner to court involves "opportunities for escape afforded by travel, the cost of transportation, * * * [and] administrative burden." *Ahrens* v. *Clark*, 335 U.S. 188, 191 (1948). See also *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 496 (1973). Moreover, requests for a writ frequently represent nothing "more than a mere desire to be freed temporarily from the confines of the prison."

Where a trial court properly concludes that the burden of producing the prisoner is outweighed by the need for the prisoner's appearance, the custodian must comply with the writ by bringing the prisoner from his place of confinement to the courthouse. This duty is justified by "the longstanding principle that 'the . . . public has a right to every man's evidence.'" *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (citations omitted). "It is beyond dispute that there is in fact a public obligation to provide evidence * * * and that this obligation persists no matter how financially burdensome it may be." *Hurtado* v. *United States*, 410 U.S. 578, 589 (1973) (footnote omitted). The expense incurred by the custodian in making available evidence in its possession—here, the prisoner himself—represents a responsibility that is indispensable to our system of justice; it is neither more nor less than a "'necessary contribution * * * to the welfare of the public.'" *Ibid.* (citation omitted). Especially given the custodian's penal interest in the confinement of the prisoner, there is nothing unfair or inappropriate in charging the custodian with this commitment.

In light of the theory of the writ, its common law origins, and the plain language of 28 U.S.C. 2243, it is clear that a writ of habeas corpus ad testificandum is

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Price v. *Johnston*, 334 U.S. at 284-285 (footnote omitted). Thus, even if the underlying lawsuit is unsuccessful, the prisoners "will nonetheless have obtained a short sabbatical in the nearest federal courthouse. * * * '[T]emporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.'" *Cruz* v. *Beto*, 405 U.S. 319, 327 & n.8 (1972) (Rehnquist, J., dissenting) (citation omitted). It also cannot be ignored that civil rights suits by prisoners often reflect the "fantasy which has its basis in the paranoia of prison rather than in fact" (*Harris* v. *Nelson*, 394 U.S. 286, 300 (1969)) and can be motivated by "[a] desire to harass officials, a hope for a quick windfall by way of nuisance settlement, or simply a discovery of a new way to pass the monotonous hours of incarceration." *Urbano* v. *Sondern*, 41 F.R.D. 355, 358 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966), cert. denied, 386 U.S. 1034 (1967).

properly addressed to the custodian of a prisoner and that the custodian is obligated to produce the prisoner in court pursuant to the writ. See *McGee* v. *Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984), appeal pending *sub nom. Arkansas Dep't of Corrections* v. *United States Marshals Service*, No. 83-3138-WA (8th Cir.). Here, petitioner does not contend that a state is immune from a federal writ of habeas corpus ad testificandum for a witness in its custody. Cf. *Hutto* v. *Finney*, 437 U.S. 678, 695-696 & n.24 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974); *Fairmont Co.* v. *Minnesota*, 275 U.S. 70, 74 (1927). Nor does it contend that the writs in this case were erroneously issued.

However, relying on *Carbo* v. *United States*, *supra*, petitioner does suggest (Pet. Br. 30-36) that the provisions in 28 U.S.C. 2243 that direct the custodian to produce the prisoner in court do not apply to the ad testificandum writ and are limited to the writ of habeas corpus ad subjiciendum—the "Great Writ" that is used to release a prisoner from unlawful custody (see *Carbo*, 364 U.S. at 614-615). Historically, the relevant language was first adopted in the Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-386, which authorized federal courts to grant writs of habeas corpus ad subjiciendum on behalf of state prisoners restrained in violation of the Constitution or laws of the United States. See, *e.g.*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 1425 (2d ed. 1973). In the statutory recodification of 1875, these provisions were integrated into the Judicial Code without restriction and applied to all forms of the writ of habeas corpus. Rev. Stat. §§ 755, 758 (1875 ed.). This structure was preserved in the 1948 recodification that is now contained in 28 U.S.C. 2243. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 965. See generally *Carbo*, 364 U.S. at 615-619.

Contrary to petitioner's suggestion, this history does not indicate that the writ of habeas corpus ad testi-

ficandum is not properly directed to the custodian. Indeed, the very purpose of the writ is to produce the incarcerated prisoner in court, and it is the custodian—and only the custodian—that, by virtue of its control over the body of the prisoner, has the authority to comply with the order. Moreover, the common law imposed on the custodian the duty to bring the prisoner into court pursuant to the writ ad testificandum, and petitioner does not argue that the provisions in Section 2243 were intended fundamentally to alter the nature and operation of the writ. The statutory language is consistent with the basic rationale and common law requirements of the writ, and there is simply no basis in the historical development of the statute to infer that it should be read, as petitioner urges, in a way that is irreconcilably at odds with its terms, purpose, and common law roots. See *Hart and Wechsler's The Federal Courts and the Federal System*, *supra*, at 1425 (the 1867 Act "prescribed the procedure on the writ * * * [which] in terms later applied to all cases of its use * * *").

Nor does this Court's decision in *Carbo* compel a different conclusion. In *Carbo*, the Court held that the provision that "[w]rits of habeas corpus may be granted by * * * [courts] within their respective jurisdictions" (28 U.S.C. 2241(a)) imposes a territorial limitation on the issuance of the Great Writ but not on the writ of habeas corpus ad prosequendum. In reaching this result, the Court found from the history of the habeas corpus statute that the territorial limitation was intended to apply exclusively to the Great Writ (364 U.S. at 615-619), that the statute specifically so provided until the 1948 recodification, which did not change prior law (*id.* at 618-619), and that this construction of the statute was consistent with longstanding procedures and common law requirements applicable to the writ ad prosequendum (*id.* at 620). Thus, in *Carbo*, the Court concluded that the congressional development and common law background of the habeas corpus act provided affirmative evi-

dence that the literal language of the statute should not be understood to restrict the availability of the writ ad prosequendum. Here, on the other hand, the language of 28 U.S.C. 2243 is in full accord with the purpose and common law requirements of the writ ad testificandum. Surely nothing in *Carbo* forecloses the conclusion that—consistently with the text of Section 2243 and the rationale and common law operation of the writ—it is the custodian of the prisoner that is required to comply with the writ of habeas corpus ad testificandum.

In view of the foregoing, the writs ad testificandum in this case were properly addressed to petitioner as the custodian of the prisoners in question, and petitioner was obligated to produce the prisoners in court pursuant to the writs. The sole question presented here is whether the magistrate erred in relieving petitioner of that lawful obligation by imposing it instead on the federal government. For the reasons to be discussed in Part B, the magistrate had no authority to shift the responsibility of production to the United States.

However, while petitioner has the duty to comply with the writs by producing the prisoners in court, that does not mean it must ultimately bear the expense of that production. Rather, as we shall outline in Part C, it is possible that at least a portion of that cost should be defrayed by the parties in the underlying civil rights litigation for which the testimony of the prisoners is sought. Regardless of any such allocation, though, there is no legal basis for requiring the federal government rather than petitioner to comply with the writs in the first instance by bringing the prisoners to court.

B. The Magistrate Lacks Authority To Shift From Petitioner To The Federal Government The Obligation Of Bringing State Prisoners To Court

In an effort to avail itself of the "deep pocket" of the United States (Pet. App. 9a), petitioner seeks to avoid its traditional obligation of complying with the writ of

habeas corpus ad testificandum and to shift to the federal government the responsibility for transporting state prisoners to court. As Judge Gibbons noted in the lead opinion below (*id.* at 10a), "[a]bsent statutory authorization, what [petitioner] proposes is a raid in its interest on the United States Treasury."

The question of the authority of the magistrate to impose this obligation on the United States Marshals Service must be analyzed in light of general principles of sovereign immunity and separation of powers. The issue before the Court involves a controversy between petitioner and the federal government over the proper functioning of the Marshals Service and the payment of the costs of transporting state prisoners. Under principles of sovereign immunity, however, petitioner cannot resort to the courts to obtain a judgment that either would " 'interfere with the public administration' " of the federal government and " 'compel it to act' " or would " 'expend itself on the public treasury.' " *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citations omitted). *See* also, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 10-11 & n.11; *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963).[7] Nor can these principles be avoided by the expedient of requesting otherwise proscribed relief against the United States incident to an underlying lawsuit to which the government is not a party.[8]

Similarly, under the doctrine of separation of powers, the judiciary does not have a roving commission to order the Executive Branch to provide assistance to private litigants in federal court or otherwise to act in accordance

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[7] Of course, states, like other litigants, are subject to the principles of federal sovereign immunity. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983).

[8] Indeed, it is the fact that the instant dispute between petitioner and the federal government is entirely collateral to the underlying litigation that renders the magistrate's order appealable under the "collateral order" doctrine. See pages 4-5 note 2, *supra*.

with a judge's conception of desirable social policy.[9] Such an order would improperly intrude on the operations of a co-ordinate branch of government and, in the circumstances of this case, would constitute an undeniable attempt to require the expenditure of federal funds in lieu of state outlays. While Congress undoubtedly has the power to prescribe the duties of the Marshals Service (see, *e.g.*, 28 U.S.C. 569), a court cannot levy responsibilities on the Marshal in the absence of affirmative legal authorization. As explained in the lead opinion in the court of appeals (Pet. App. 17a), there is no basis to "permit district courts to impose the expenses of litigation upon the Treasury of the United States whenever that seemed to the court to be a good idea. Both common sense and appropriate concern for separation of powers caution against such an arrogation of judicial power."

In view of these considerations, we submit that a clearly expressed source of authority is necessary for the magistrate to order the Marshal to transport state prisoners. See, *e.g.*, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983). It is not enough that no provision of law prohibits the Marshal from transporting state prisoners; rather, there must be affirmative authorization for the magistrate's directive to the Marshal. See, *e.g.*, *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). As we now discuss, neither of the provisions upon which petitioner relies—the All Writs Act (28 U.S.C. 1651) and the Marshals statute (28 U.S.C. 567, 569)—suffices to carry its burden of showing the existence of the requisite authority.

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[9] There can be no doubt that the Marshals Service is within the Executive Branch of the federal government. See Pet. App. 38a-39a (Becker, J., concurring). The United States Marshal for each district is appointed by the President (see 28 U.S.C. 561(a)), is subject to the supervision and direction of the Attorney General (see, *e.g.*, 28 U.S.C. 561(c), 562, 567, 569(c), 571(a) and (d)), and is funded through Department of Justice appropriations (see, *e.g.*, 28 U.S.C. 567; Pub. L. No. 98-411, 98 Stat. 1554.

1. *The All Writs Act Does Not Authorize The Magistrate To Require The Marshal Rather Than The State To Transport State Prisoners To Court*

As authority for the magistrate's order, petitioner places principal reliance on the All Writs Act (28 U.S.C. 1651).[10] In essence, petitioner asserts that the All Writs Act can be used to obviate the established obligations of the custodian under an ad testificandum writ by imposing on the United States Marshals Service, as a non-party to the underlying litigation, the responsibility for producing state prisoners in court. Petitioner's assertion is unsound and is unsupported by either common sense or legal precedent.[11]

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[10] As petitioner concedes (Pet. Br. 29 n.15), the magistrate did not rely on the All Writs Act in issuing his order (see Pet. App. 51a-52a). Moreover, in neither the trial court nor the court of appeals did petitioner invoke the All Writs Act as a source of statutory authority for the magistrate's order (see Pet. App. 13a, 15a).

[11] Petitioner does not identify the nature of the writ that it contends is authorized by the All Writs Act. It would not appear to be in the nature of a writ of habeas corpus, since it is not, as those writs require, addressed to the person who has custody of the body. Moreover, since there is no mandatory duty on the part of the Marshal to transport state prisoners, the writ would not be in the nature of mandamus. See, *e.g.*, *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 13; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958); *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420 (1931). Additionally, because mandamus will lie only where there is no alternative remedy (see, *e.g.*, *Heckler* v. *Ringer*, slip op. 13; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)), it would not be available here in light of the ad testificandum writ for bringing the state prisoners to court. In these circumstances, there is no occasion to consider the issue, discussed by petitioner (Pet. Br. 48-50) and by the court below (Pet. App. 16a-17a, 32a-37a), whether an otherwise appropriate writ of mandamus would be barred by *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 504 (1813), and *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821). See, *e.g.*, 28 U.S.C. 1361; *Stafford* v. *Briggs*, 444 U.S. 527, 533-534 (1980); *In re Blake*, 175 U.S. 114, 119-120 (1899); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 615, 617 (1838).

Contrary to petitioner's argument, the courts have recognized that the All Writs Act cannot be applied in ways that circumvent or contravene established legal requirements. For example, in *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 397, 401-402 (1982), this Court held that the All Writs Act did not authorize the imposition of the costs of a remedial civil rights decree on parties that were not subject to such relief under traditional standards; emphasizing that these entities "could not be held liable to any sort of injunctive relief based on their own conduct" (458 U.S. at 402), the Court concluded that the "obligations [ordered by the district court] can be imposed neither under traditional equitable authority * * * nor under the All Writ Act" (*ibid.*) (footnote omitted). See also, *e.g.*, *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980) (mandamus under All Writs Act cannot be employed to avoid final judgment rule). Likewise, the courts of appeals have rejected such a use of the Act. See, *e.g.*, *Florida Medical Ass'n* v. *HEW*, 601 F.2d 199 (5th Cir. 1979); *Ben David* v. *Travisono*, 495 F.2d 562 (1st Cir. 1974). As the court explained in *Florida Medical Ass'n* (601 F.2d at 202), the All Writs Act does not "empower a district court to abandon the [Federal Rules of Civil Procedure] * * * * * [or] to promulgate an *ad hoc* procedural code whenever compliance with the *Rules* proves inconvenient."

This principle is consistent with the language and origin of the All Writs Act. The Act derives from Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82, which provided that

> all the * * * courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

In subsequent enactments, the provisions for writs of habeas corpus and for all other writs were codified in

separate sections (see *Carbo*, 364 U.S. at 615-616, 617-618) and are now found respectively in 28 U.S.C. 2241 *et seq.* and 28 U.S.C. 1651. The original phrase "not specially provided for by statute" remained in the all writs section until the 1948 recodification of the Judicial Code, which consolidated various provisions into Section 1651 and made "necessary changes in phraseology" but without substantive amendment. See H.R. Rep. 308, 80th Cong., 1st Sess. A144 (1947); see also *id.* at 5. Likewise, the 1948 revision clarified, as had previously been held (see *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942)), that the writ must be necessary "or appropriate" for the exercise of a court's jurisdiction.

In light of its history and evident purpose, the All Writs Act is correctly seen to be a residual source of authority to issue appropriate writs that are not otherwise covered by law. Where a legal rule or doctrine specifically addresses the particular question under consideration, it is that authority, and not the general All Writs Act, that is applicable and controlling. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). In this way, the All Writs Act is properly restricted, in the words of the first Judiciary Act, to "other writs not specially provided for by statute." Here, the writ of habeas corpus ad testificandum affords a specific and historically utilized means of obtaining the presence of a prisoner in court, and the residual All Writs Act cannot be invoked to displace that established form of process.

Indeed, this limitation on the scope of the All Writs Act is especially appropriate in cases involving the writ of habeas corpus ad testificandum. Given that the Judiciary Act of 1789 initially codified the ad testificandum writ in the same section as the all writs provision, the general authorization to issue "other writs not specially provided for by statute" cannot be understood to allow the circumvention of that traditional writ. Any other interpretation would torture the meaning of the Judiciary Act and render it internally inconsistent.

Moreover, the All Writs Act provides that the issuance of such other writs be agreeable to the principles and usages of law and necessary or appropriate for the exercise of the court's jurisdiction. Whatever other limitations may be imposed by these provisions, they clearly foreclose the use of the Act to evade or defeat the established legal requirements for the writ of habeas corpus ad testificandum. Invocation of the All Writs Act to that end would ignore rather than further the salutary purposes of the statute.

The cases cited by petitioner do not support its argument that, under the All Writs Act, a court may shift from petitioner to the non-party Marshal the traditional obligation of the custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum. Petitioner first relies (Pet. Br. 19-25) on *Price* v. *Johnston*, 334 U.S. 266 (1948), and *Harris* v. *Nelson*, 394 U.S. 286 (1969). In *Price*, the Court ruled that the All Writs Act authorized the issuance of an order to require the custodian to bring a prisoner to court to present oral argument on his appeal from the denial of a petition for a writ of habeas corpus. In *Harris*, the Court held that the All Writs Act authorized a court to provide for discovery by the parties in a habeas corpus proceeding.

Notwithstanding petitioner's argument, the issues in those cases stand in marked contrast to the present controversy. Initially, we note that the writs in *Price* and *Harris* ran against a party in the proceeding. Those cases did not consider the application of the All Writs Act to a stranger to the underlying litigation.

Furthermore, no other legal rule or doctrine addressed the issues raised in those cases, and the All Writs Act was the only means available to implement the given procedure in order to facilitate the proper disposition of the lawsuit. In *Price* there was no alternative method to bring the prisoner to court for oral argument (or, since the prisoner was not represented by counsel, for hearing argument on his behalf at all), while in *Harris* no

other mechanism existed for taking discovery in a habeas corpus case. Here, on the other hand, courts have a traditional form of process—the writ ad testificandum—for obtaining the presence of a prisoner, and thus resort to the All Writs Act is not, as the statute requires, either necessary and appropriate or confined to orders not otherwise provided for by law.

Likewise, the writs in *Price* and *Harris* were consistent with other principles of law and did not circumvent established legal requirements. In *Price*, while no form of the writ of habeas corpus had traditionally served to bring a prisoner to court for oral argument, such use of the All Writs Act was in accord with the fundamental nature of the habeas corpus writ "to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause" (334 U.S. at 283); in *Harris*, although the discovery provisions in the Federal Rules of Civil Procedure were not directly applicable in habeas corpus proceedings, use of the All Writs Act to provide for discovery was consistent both with the procedures under the Rules and with the recognized power of a court to develop the facts relevant to the disposition of the cause before it (394 U.S. at 299-300). In the instant case, however, petitioner invokes the All Writs Act in contravention of the established requirements of the writ ad testificandum and thereby seeks to avoid its traditional obligations as custodian of the prisoners in question.

For much the same reasons, petitioner's position is also not supported by the decision in *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977), in which the Court upheld an order under the All Writs Act requiring the telephone company to provide assistance to the government in utilizing a pen register. First, contrary to petitioner's fundamental assumption, *New York Telephone* does not sanction the use of the All Writs Act whenever the issuance of a writ would not impose an unreasonable burden. Rather, the Court merely recognized

(434 U.S. at 171-172) that a writ otherwise authorized by the statute would be improper if it resulted in an unreasonable burden.

Moreover, the subject of the writ in *New York Telephone* was a private corporation, not the federal government, and therefore that case raised none of the considerations of sovereign immunity and separation of powers that are applicable in the present case. In fact, the telephone company was "a highly regulated public utility with a duty to serve the public" (434 U.S. at 174 (footnote omitted)), and it regularly employed pen registers for its own business purposes (*id.* at 174-175). And the company was to "be fully reimbursed at prevailing rates, and compliance with [the court's order] required minimal effort on * * * [its] part * * * and no disruption to its operations." *Id.* at 175; see also *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 401. Here, in contrast, no provision of the magistrate's order requires petitioner to reimburse the Marshal or ensures that the transporting of state prisoners would not interfere with the Marshal's statutory responsibilities.

In addition, in *New York Telephone* the issuance of the writ was "necessary" (434 U.S. at 161) to "effectuate and prevent the frustration of orders [the district court] has previously issued" (*id.* at 172). As the Court repeatedly emphasized, implementation of the district court's pen-register order would not have been possible absent the assistance of the telephone company (see *id.* at 164 n.4, 172, 174, 175 & n.23; see also *General Building Contractors Ass'n*, 458 U.S. at 401); "without the [c]ompany's assistance there is no conceivable way in which the surveillance authorized by the [d]istrict [c]ourt could have been successfully accomplished" (434 U.S. at 175 (footnote omitted)). In this case, on the other hand, it was not necessary or appropriate to direct the Marshal to transport state prisoners in order to safeguard the trial court's processes, since petitioner as the custodian of the prisoners could be required to produce them pursuant to a writ of habeas corpus ad testificandum.

Finally, in *New York Telephone* the All Writs Act was the exclusive source of authority that existed for obtaining the assistance of the telephone company. Accordingly, issuance of the writ was not inconsistent with or in circumvention of established legal requirements. Indeed, the Court noted that use of the writ was in accordance with both the duty of citizens to provide needed aid to law enforcement officials (434 U.S. at 175-176 n.24) and the intent of Congress in the area of electronic surveillance and pen registers (*id.* at 176-178). Nothing in *New York Telephone* authorizes the All Writs Act to be used, as petitioner seeks, to evade writs of habeas corpus ad testificandum under 28 U.S.C. 2241 and shift from the state custodian to the federal government the obligation of producing state prisoners in court.

2. *The Statute Governing The Marshals Service Does Not Authorize The Magistrate To Require The Marshal To Transport State Prisoners To Court*

Petitioner further argues that the statute governing the Marshals Service authorizes the magistrate to require the Marshal to transport the state prisoners in this case. Petitioner relies on 28 U.S.C. 569(b), which provides that "United States marshals shall execute all lawful writs, process and orders issued under authority of the United States * * *." [12] As the court below correctly recognized, however, Section 569(b) is "not a separate source of judicial authority to issue writs, process and orders, but only a source of the Marshals' duty to execute them when they have been issued pursuant to some other source of authority" (Pet. App. 11a; see also *id.* at 25a n.2 (Becker, J., concurring)).

If petitioner's reading of the statute were correct, courts would have virtually unrestricted control of the

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[12] See also *Ford* v. *Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984); *Wiggins* v. *County of Alameda*, 717 F.2d 466, 469 (9th Cir. 1983), cert. denied *sub nom. California Dep't of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984); *Ballard* v. *Spradley*, 557 F.2d 476, 481 (5th Cir. 1977).

operation of the Marshals Service. Under petitioner's view, the fact that a court issues an order to the Marshal to carry out a specified action would necessarily establish authorization for the order, since it could equally be said there as here that the Marshal is simply being required to execute the court's order in compliance with Section 569(b). The only limitation on the court's authority over the Marshal would be whatever limits exist on its authority to prescribe the substantive terms of the order; any order that the court is empowered to enter could, if the court chooses, be directed to the Marshal in the first instance. Thus, just as petitioner seeks to justify the order in this case, myriad orders now issued in litigation could, in the discretion of the court, be imposed on the Marshal. Such an unreasonable and circular interpretation of the statute must be rejected.

In support of its argument, petitioner also cites 28 U.S.C. 567(2), which states that "[u]nder regulations prescribed by the Attorney General, each United States marshal shall be allowed * * * the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards * * *." [13] However, this statute does not resolve—indeed, it is entirely silent on—the issue of the Marshal's substantive authority to transport prisoners; it merely provides for the payment of federal funds for expenses that the Marshal incurs in transporting prisoners as otherwise authorized by law. Moreover, even if the statute permits the Marshal to use appropriated funds for the transportation of state prisoners in the circumstances of this case, that would in no way relieve petitioner of its traditional obligations under the ad testificandum writ or authorize the magistrate to require the federal treasury to bear the expense of producing the state prisoners in court. See *Story* v. *Robinson*, 689 F.2d 1176, 1179

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[13] See also *Ford* v. *Allen*, 728 F.2d at 1370; *Wiggins* v. *County of Alameda*, 717 F.2d at 469; *Ballard* v. *Spradley*, 557 F.2d at 481.

(3d Cir. 1982); *McGee* v. *Rankin*, 584 F. Supp. at 1204. It is one thing for Congress to appropriate funds to enable the Marshal to perform his given functions; it is quite another for a federal court to direct the Marshal to expend those funds in order to satisfy a duty that the law imposes on someone else. And under petitioner's reading, the statute would authorize courts to require the Marshal to transport state prisoners even in state proceedings.[14]

Contrary to petitioner's argument, the Marshals Service has construed Section 567(2) to apply only to prisoners either held in federal custody or transported under a cooperative or intergovernmental agreement. See 28 C.F.R. 0.111(j) and (k). That construction is premised on the Marshal's authority over federal prisoners and over other prisoners where provided by cooperative or intergovernmental agreement. In contrast, there is no basis for requiring the Marshal to transport state prisoners in connection with a civil rights action to which the federal government is not a party.

Indeed, the Marshals Service has specifically concluded that it is not responsible for transporting state prisoners in the circumstances of the instant case. The current Manual of the Marshals Service provides:

> Traditionally, writs of habeas corpus for cases in which the Federal government is not a party, are executed by the prisoner's custodian. If the court orders the U.S. Marshal and the state to produce a state prisoner, such as in the case of a civil rights issue, the U.S. Marshal should attempt to have the court amend its order so it is directed solely to the state custodian. If this attempt fails the U.S.

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[14] Courts have recognized that federal funds generally are not authorized for the transportation of state prisoners in actions to which the United States is not a party. See *Clark* v. *Hendrix*, 397 F. Supp. 966, 975 (N.D. Ga. 1975); *Diaz* v. *Chatterton*, 229 F. Supp. 19, 22, 23 (S.D. Cal. 1964); *Urbano* v. *Sondern*, 41 F.R.D. at 358.

> Marshal should serve the writ directed to him on the state custodian, inform the state custodian of the state's obligation to produce the prisoner, and make an appropriate return on the writ as executed. It is the position of the Marshals Service that the state has the obligation to produce its state prisoners to Federal court once such a writ of habeas corpus is issued.
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> * * * * *
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> *State Prisoners in Federal Civil Cases.* The custodian of the prisoner is responsible for transporting and producing state or local prisoners in a Federal civil case. The Federal court order should be directed to the state or local authority who has custody of the prisoner. * * *

U.S. Dep't of Justice, *United States Marshals Manual* §§ 6.1-4.c.3, 8.5-5.b (Sept. 1983). Similarly, the Manual in effect at the time the ad testificandum writs were issued in the present case provided:

> It is the Marshals Service's position that in Federal civil rights suits filed by state prisoners against state officials the state should transport the prisoner to and from Federal Court and bear any of the prisoners having expenses. The Marshals Service should *not* reimburse the state for any of their expenses. If the Marshal is ordered to transport such prisoners, the United States Marshals Service Legal Counsel should be immediately notified.

U.S. Dep't of Justice, *United States Marshals Financial Management Manual* 340.26 (July 1, 1975) (emphasis in original).[15] The Marshals Service's interpretation of its own authority is entitled to substantial deference by the courts. See, *e.g.*, *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978).[16]

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[15] This provision is carried forward in Section 3.15-19.c.3 of the *United States Marshals Manual.*

[16] Petitioner argues (Pet. Br. 45-46 n.19) that the 1975 Manual obligates the Marshal either to transport state prisoners to federal

For these reasons, 28 U.S.C. 567(2) and 569(b) do not support petitioner's contention that the Marshals Service can be required to transport the state prisoners to court in this case. Moreover, this conclusion is reinforced by a comparison of those statutes to other provisions of law that do specify a role for the federal government in the process of obtaining witnesses. For example, 28 U.S.C. 1825 provides that the Marshal shall pay the fees both for government witnesses in cases in which the United States is a party and for the witnesses of a party proceeding in forma pauperis in cases under 28 U.S.C. 2255.[17] See also pages 40-41, *infra*. In addition, Fed. R. Crim. P. 17(b) states that with respect to a subpoena on behalf of an indigent criminal defendant, "the costs incurred by the process and fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government." The Marshals Service advises us that, in the many cases covered by these provisions, it rather than the state has assumed the responsibility for producing state prisoners in court. These provisions, however, represent specific authorizations for the involvement

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court or to reimburse the state for their transportation. However, the passage relied upon by petitioner relates to the production of state prisoners in cases in which the United States is a party, since it refers to the participation of the United States Attorney in the process of producing the prisoner; as discussed below (see pages 29, 40, *infra*), 28 U.S.C. 1825 expressly provides that in cases in which the federal government is a party, the Marshal shall pay the fees for the government's witnesses. Furthermore, the cited passage cannot be interpreted as petitioner proposes, for it is immediately followed by the specific provision, quoted in the text above, that "in Federal civil rights suits * * * the state should transport the [state] prisoner to and from Federal Court and bear any of the * * * expenses."

[17] 28 U.S.C. 1825 also provides for the Marshal to pay witness fees for an indigent party challenging a state conviction in habeas corpus cases under 28 U.S.C. 2254.

of the federal government and constitute particular exceptions adopted by Congress to the general obligation of a custodian pursuant to a writ of habeas corpus ad testificandum. In contrast, 28 U.S.C. 567(2) and 569(b) cannot be read to provide the same specific and exceptional authorization for the Marshal to transport the state prisoners in this case. See also pages 40-41 and note 33, *infra*. Where Congress has prescribed limited exceptions as a matter of policy, courts are not free to create additional exceptions. See, *e.g.*, *Block* v. *Community Nutrition Institution*, No. 83-458 (June 4, 1984), slip op. 6; *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 (1981).

Finally, petitioner suggests (Pet. Br. 37-38) that the expense of producing state prisoners in court, like the expenses of providing a judge and a courtroom, should be met by the federal government as a necessary cost of furnishing a forum for the resolution of lawsuits under 42 U.S.C. 1983. However, witness expenses are not traditionally considered to be a cost of the tribunal, but instead are customarily borne by the parties to the litigation or by the witnesses themselves. See 28 U.S.C. 1821, 1920(3); see also page 13, *supra*, and pages 35-36, *infra*. On the other hand, the costs of a judge or a courtroom, which are inherent features of the judcial process, are traditionally treated as part of the administration of the system of justice (see, *e.g.*, *Gleckman* v. *United States*, 80 F.2d 394, 403 (8th Cir. 1935), cert. denied, 297 U.S. 709 (1936)), and Congress in fact has made express provision —out of appropriations for the Judicial rather than the Executive Branch—to pay those expenses. In the absence of a similar congressional enactment applicable to state prisoners, and in light of the custodian's established obligation to bring its prisoners to court, petitioner's attempted analogy is unpersuasive and affords no basis for shifting the cost of production from the state to the federal government.

3. *Requiring The Marshals Service To Transport State Prisoners Would Impose A Significant Burden On The Federal Government*

If Garland and his proposed witnesses were federal rather than state prisoners, the Marshals Service would be responsible for transporting them to court pursuant to a writ of habeas corpus ad testificandum. The result we urge in this case simply recognizes the corresponding obligation of petitioner with respect to prisoners in its custody.

Petitioner complains (Pet. Br. 16), however, that such an obligation would constitute a "dramatic drain on the state's financial resources * * *." At the same time, petitioner contends (Pet. Br. 36-37) that requiring the Marshals Service to transport state prisoners would *not* impose a significant burden on the federal government. Petitioner's argument is thus internally inconsistent and also ignores the practicalities of the issue.

The burden on the Marshals Service cannot be viewed in the context of an individual case or the litigation involving a single state. Instead, it must be considered in the aggregate on a nationwide basis. Given the burgeoning number of civil rights suits by state prisoners against state or local defendants,[18] it blinks reality for petitioner to assert that the Marshal would not be subjected to substantial demands and expense in transporting state prisoners.

Moreover, the Marshals Service, no less than other units of the federal government, is facing serious budget constraints.[19] Indeed, the Marshals Service advises us

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[18] The number of civil rights actions filed in federal court by state prisoners against state or local defendants has increased from 2,030 in 1970 to 18,034 in 1984. See U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1983*, Table 5.24, at 514; Administrative Office of the United States Courts, *1984 Annual Report of the Director*, Table C2, at A-7.

[19] See, *e.g.*, 128 Cong. Rec. H9848-H9849 & n.1, H9849-H9850, H9852, H9853-H9854 (daily ed. Dec. 15, 1982) (amendment to

that there are only 21 deputy marshals in the Eastern District of Pennsylvania and fewer than 1,000 deputy marshals in the 94 districts across the country. The limitations on the Marshals Service's manpower become evident in light of the fact that the federal judicial system currently has some 500 active district judges (and 200 senior district judges) and approximately 250 full-time magistrates (with 230 part-time magistrates), as well as additional judges in the Bankruptcy Court, the Claims Court, and the District of Columbia Superior Court. Furthermore, approximately 500 federal court facilities are now in use. And in 1984 the Marshals Service handled more than 82,000 prisoners in connection with federal matters. To require the Marshals Service to transport state prisoners would divert it from the functions that Congress has entrusted to it, including its responsibilities for federal prisoners, the security of the federal courthouse and court personnel, the execution of arrest warrants and seizure of forfeited property, and numerous other duties necessary to law enforcement and the federal court system.

Petitioner advances an expansive view of the role of the courts, contending that "the tools available to the judiciary must be used creatively in order to respond to changing demands on the judicial system" (Pet. Br. 17). However, courts are ill-suited to assess the foregoing considerations. Rather, it is a policy question for *Congress* whether the United States Marshals Service should transport state prisoners to court in suits under 42 U.S.C. 1983.[20] A legislative solution would allow Congress to

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Fed. R. Civ. P. 4 on service of process by Marshal); 102 F.R.D. 423, 424, 439 (1984) (proposed amendments to Federal Admiralty Rules on service of process by Marshal); Joint Statement of the Chief Justice and the Attorney General Before the Judicial Conference of the United States (Mar. 11, 1982) (courthouse security).

[20] Compare, *e.g.*, the Interstate Agreement on Detainers Act, 18 U.S.C. App. at 545-548. In Section 2, Article V (a) and (h), the Act specifically provides that the sending "State shall offer to de-

weigh the various competing interests—of the federal government, the states, and the litigants in civil rights actions—in this era of expanding judicial dockets and limited governmental resources at all levels; it is eminently a choice for Congress to make whether the funds allocated to the Marshals Service should be spent for transporting state prisoners in connection with Section 1983 litigation or whether they instead would be better used to support other aspects of the federal judicial system. See Pet. App. 44a-45a (Becker, J., concurring). In addition, Congress can also consider a variety of systemic mechanisms and alternative approaches—such as the presentation of testimony through depositions taken in the prison, or sending magistrates to conduct proceedings at the prison where necessary—to reduce the problem of transporting prisoner witnesses. Finally, legislation could take account of the range of historical practices and understandings that have been developed in light of local conditions in the districts and divisions around the country.[21]

Until such time as Congress provides to the contrary, however, it is the established obligation of the custodian to produce a prisoner in court pursuant to a writ of habeas corpus ad testificandum. Neither the All Writs Act nor the Marshals statute authorizes the magistrate in this case to relieve petitioner of that obligation or to shift

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liver temporary custody of [the requested] prisoner to the appropriate authority in the [receiving] State * * *" and that "[f]rom the time that [the receiving] State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the [receiving] State * * * shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner."

[21] It might also be possible for the Marshals Service or the Marshal in each district to enter into an agreement with a state to provide for appropriate transportation procedures.

to the Marshals Service the responsibility of transporting state prisoners.[22]

C. Although Petitioner Is Obligated To Produce Its Prisoners In Court, The Parties To The Underlying Civil Rights Action May Be Required To Provide Reimbursement To Petitioner For Its Expenses

Because the obligation to produce the requested state prisoners in court rested on petitioner as their custodian and could not be shifted to the United States Marshals Service, the judgment of the court of appeals reversing the magistrate's order should be affirmed. This is not to say, however, that petitioner must ultimately bear the entire cost of that production. Rather, it is possible that the parties to the underlying civil rights action should defray at least a portion of those costs. Although the Court need not resolve this issue in order to decide the question that petitioner has presented, we think it appropriate to outline our preliminary analysis of the issue to make clear that a rejection of petitioner's position here does not mean that the costs of production will necessarily be borne by petitioner in the end.

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[22] If the Court concludes, contrary to our submission, that a trial court has discretion to require the Marshal instead of the state to undertake to transport state prisoners, that discretion should be restricted to exceptional circumstances where considerations of safety or security demonstrate that the Marshals Service, because of special training, equipment, or other capability or resource, is materially better able than the state to transport the prisoners. This would reflect the traditional requirements of the writ of habeas corpus ad testificandum and would be consistent with the nature of the All Writs Act, since the aid of the Marshal would be confined to those cases in which it is necessary to the proper effectuation of the court's writ. In the present case, petitioner has not contended that it could not comply with the writ by bringing its prisoners to the courthouse. The transportation responsibility should not be shifted to the federal government, as was done here, simply because of its "deep pocket" or the supposition that it could convey the prisoners at an incrementally lower cost than the state.

Since petitioner is required to bring its prisoners to court pursuant to the ad testificandum writ, it will, in the first instance, incur the costs of production. In our view, the issue whether the parties to the underlying lawsuit should reimburse petitioner for those costs is properly analyzed by reference to the customary legal rules for imposing witness expenses in litigation. This analysis proceeds along the following lines.

1. If a non-indigent plaintiff [23] seeks to subpoena a non-prisoner witness to appear at trial in a federal lawsuit, he is required to pay the witness the prescribed fees for attendance and mileage. See 28 U.S.C. 1821(b) and (c); Fed. R. Civ. P. 45(c) and (e). In addition, a witness who is not incarcerated is entitled to a designated subsistence allowance for necessary overnight stays. See 28 U.S.C. 1821(d). These witness expenses are taxable as costs to the losing party at the conclusion of the action. See 28 U.S.C. 1920(3); Fed. R. Civ. P. 54(d). Thus, as between the parties, these specified witness expenses are generally imposed on the unsuccessful litigant. Moreover, if a prevailing party incurs witness expenses that are not covered by statute, the district court has a limited discretion to tax those non-statutory costs to the losing party as well. See, *e.g.*, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232, 234-235 (1964); *Fressell* v. *AT & T Technologies, Inc.*, 103 F.R.D. 111, 112, 116 (N.D. Ga. 1984); *Ingersoll Milling Machine Co.* v. *Otis Elevator Co.*, 89 F.R.D. 433, 435 (N.D. Ill. 1981).

The statutory fees allowed to a witness can be significantly less than his out-of-pocket and opportunity costs in being required to testify. Although Congress sought to provide fees that would " 'be reasonably fair to the average witness,' " it " 'recognized that certain witnesses will not * * * be adequately compensated.' " H.R. Rep.

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[23] In order to parallel the facts of the present case, this discussion is framed in terms of a witness sought by the plaintiff. The same analysis applies, however, whichever party offers the witness.

95-1651, 95th Cong., 2d Sess. 3 (1978) (citations omitted). The amounts provided constitute "the minimally acceptable level" of payment but are not "intended as reimbursement for lost income, witness service being a public obligation for which the Government is not required to provide compensation" (*ibid.*). See also S. Rep. 95-756, 95th Cong., 2d Sess. 2 (1978). In those instances in which the statutory fees do not provide full compensation, the witness himself must bear the remaining cost as part of his public duty to give testimony. See *Hurtado* v. *United States*, 410 U.S. 578, 589 (1973).

Thus, under the rules of federal civil litigation, the expenses of obtaining a witness to testify are generally divided among the plaintiff, the defendant, and the witness. Initially, the party presenting the witness must incur the expenses specified by statute, which are later taxed to the losing side as costs. Any additional witness expenses incurred by the propounding party will normally remain its responsibility, but, in the exercise of the district court's discretion in exceptional cases, they can be taxed in whole or in part to the unsuccessful litigant. Finally, to the extent that these payments are not fully adequate, the witness himself must absorb the costs of his appearance.

2. Where a non-indigent plaintiff seeks the testimony of a prisoner witness, a number of different considerations arise. As noted above (see pages 10-11, *supra*), the plaintiff must obtain a writ of habeas corpus ad testificandum rather than a subpoena for the witness. In addition, because he is incarcerated and will be transported by the custodian, the witness is not entitled to the statutory fees for attendance, mileage, or subsistence.[24] And, most importantly for present purposes, the cost of production will include those expenses necessary to main-

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[24] See 28 U.S.C. 1821(d)(1); *In re Grand Jury Matter*, 697 F.2d 103 (3d Cir. 1982), aff'g 533 F. Supp. 401 (E.D. Pa.); *Marchese* v. *United States*, 453 F.2d 1268, 1270-1271 (Ct. Cl. 1972); *Meadows* v. *United States Marshal*, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971).

tain custody of the prisoner and ensure his secure transfer.

Here, too, the general rules described above provide the proper analytical framework. The plaintiff, as the proponent of the witness, can fairly be expected to bear his share of the witness expenses. At the least, he should contribute to the overall cost an amount approximating what he would have had to expend if the witness were not a prisoner—that is, attendance fees, mileage, and subsistence. In addition, the court would have to decide whether the remaining expenses should be borne by the plaintiff—who seeks to offer the witness's testimony as part of his case and must take his witnesses as he finds them—or whether a portion of those expenses should be imposed on the state custodian—which has a penal interest in the continued confinement of the witness and has a public duty to produce relevant evidence in its possession. See *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 246-247 (5th Cir. 1984).[25]

3. Finally, there is the situation, which is presented in this case, of a plaintiff proceeding in forma pauperis who seeks the testimony of a prisoner witness. The foregoing analysis is equally applicable here unless the law excuses an indigent plaintiff from those expenses of production that would otherwise be imposed on him.[26]

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[25] As between the plaintiff and the custodian, the same general analysis applies where the plaintiff is himself a prisoner and seeks to be present for trial. However, with respect to the taxation of those expenses as costs if the defendant is the losing party, a somewhat different analysis would be applicable. Under general principles, a party usually pays its own expenses of traveling to and attending trial, but a district court has some discretion to tax those expenses as non-statutory costs. See, *e.g.*, *Hodge* v. *Seiler*, 558 F.2d 284, 287 (5th Cir. 1977). Accordingly, a plaintiff, even if he prevails, may be required to bear a greater portion of such expenses than would be appropriate in the case of witness expenses.

[26] See *Marks* v. *Calendine*, 80 F.R.D. 24, 31 (N.D. W. Va. 1978), aff'd, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (unsuccessful indigent prisoner-plaintiff in Section 1983

Neither of the two statutes relevant to this issue establishes such an exemption.[27]

First, 28 U.S.C. 1915(a), which provides for proceedings in forma pauperis, states that a court "may authorize the commencement, prosecution or defense of any suit * * * without prepayment of fees and costs or security therefor * * *." If leave is granted, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." 28 U.S.C. 1915 (c). In addition, "[j]udgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred." 28 U.S.C. 1915(e).

As this language indicates, in forma pauperis plaintiffs may proceed without "prepayment" of fees and costs. While an indigent plaintiff is thus excepted from prepaying specified expenses, nothing releases him from liability for such expenditures at the conclusion of the case if he is unsuccessful.[28] Indeed, not only must the losing plaintiff bear his own litigation expenses, but under Section 1915(e) he may be taxed his opponent's costs as

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action ordered to bear custodian-defendant's expenses of producing plaintiff and his prisoner-witnesses pursuant to ad testificandum writ).

[27] In the absence of statutory authorization, principles of sovereign immunity would, of course, preclude the imposition of liability for these costs on the United States. See, *e.g.*, *United States* v. *MacCollom*, 426 U.S. 317 (1976); *Fairmont Co.* v. *Minnesota*, 275 U.S. 70, 73-74 (1927); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20 (1926).

[28] See, *e.g.*, *Barcelo* v. *Brown*, 655 F.2d 458, 462 (1st Cir. 1981); *Flint* v. *Haynes*, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), aff'g *Marks* v. *Calendine*, 80 F.R.D. 24 (N.D. W. Va. 1978); *Partee* v. *Lane*, 528 F. Supp. 1254, 1264-1265 (N.D. Ill. 1981); but see *Evans* v. *Tennessee Dep't of Corrections*, 514 F.2d 283 (6th Cir. 1975).

well even where his position, although unavailing, was not frivolous or advanced in bad faith.[29]

Furthermore, 28 U.S.C. 1915 does not extend to witness fees and expenses and therefore does not impose responsibility for those expenditures on the federal government rather than the plaintiff. By its terms, Section 1915(c) provides that the court shall issue and serve all process without charge;[30] Section 1915(b) directs that in certain circumstances the government shall pay for the preparation of a transcript and the printing of the record on appeal; and Section 1915(d) authorizes the appointment of counsel for an indigent party. Nowhere, however, does Section 1915 refer to the expenses of producing witnesses in court. On the contrary, Section 1915(c) specifically states that "[w]itnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." And Section 1915(e) further provides that "the United States shall not be liable for any of the costs * * *" in the proceeding.[31] In light of these statutory provisions, courts have held that Section 1915 does not "authorize[] a district court to order government payment of an indigent's witness fees and expenses." *United States Marshals Service* v. *Means*, 741 F.2d 1053, 1056 (8th Cir. 1984) (en banc).[32] Likewise,

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[29] See, *e.g.*, *Harris* v. *Forsyth*, 742 F.2d 1277 (11th Cir. 1984); *Flint* v. *Haynes*, 651 F.2d at 973; *Chevrette* v. *Marks*, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983); cf. *Duhart* v. *Carlson*, 469 F.2d 471 (10th Cir. 1972), cert. denied, 410 U.S. 958 (1973); see also H.R. Rep. 1079, 52d Cong., 1st Sess. 2 (1892).

[30] See also Fed. R. Civ. P 4(c)(2)(B)(i).

[31] See S. Rep. 1020, 82d Cong., 1st Sess. 17 (1951).

[32] See also, *e.g.*, *Johnson* v. *Hubbard*, 698 F.2d 286, 289-290 (6th Cir.), cert. denied, 464 U.S. 917 (1983); *Hudson* v. *Ingalls Shipbuilding*, 516 F. Supp. 708, 709 (S.D. Ala. 1981); *Dortly* v. *Bailey*, 431 F. Supp. 247, 248 (M.D. Fla. 1977); *Clark* v. *Hendrix*, 397 F. Supp. 966, 975 (N.D. Ga. 1975); *Diaz* v. *Chatterton*, 229 F. Supp. 19, 23 (S.D. Cal. 1964); *Andrews* v. *Atkins*, 100 F.R.D. 762, 764, 765 (D. Kan. 1984); *Cagle* v. *Cox*, 87 F.R.D. 467, 468 (E.D. Va.

the Comptroller General has determined that the United States cannot be required to pay an indigent plaintiff's witness expenses in an action under 42 U.S.C. 1983.[33]

In addition, 28 U.S.C. 1825 does not render the United States responsible for the witness expenses of an in forma pauperis plaintiff. In our view, the first paragraph of Section 1825, which provides that in cases in which the United States is a party "the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States Attorney," is limited to the fees of witnesses for the government.[34] In any event, that provision has no application in the present case, since the United States is not a party to the underlying Section 1983 action.

The second paragraph of Section 1825 also does not authorize federal payment in this case. While that provision does direct the Marshal to pay the fees of a witness for an indigent party, it is explicitly confined to "proceedings * * * for a writ of habeas corpus or * * * proceedings under [28 U.S.C.] 2255" and therefore does not apply to a civil rights suit under 42 U.S.C. 1983. Indeed, in enacting this provision, Congress emphasized that witness fees for indigent defendants in criminal prosecutions are paid by the United States pursuant to Fed. R.

1980); *Marks* v. *Calendine*, 80 F.R.D. at 29; cf. *Lloyd* v. *McKendree*, 749 F.2d 705 (11th Cir. 1985); *Barcelo* v. *Brown*, 655 F.2d at 462; *Lewis* v. *Precision Optics, Inc.*, 612 F.2d 1074 (8th Cir. 1980); *Estep* v. *United States*, 251 F.2d 579, 582 (5th Cir. 1958); *Moss* v. *ITT Continental Baking Co.*, 83 F.R.D. 624, 625-627 (E.D. Va. 1979); *Haymes* v. *Smith*, 73 F.R.D. 572, 574 (W.D. N.Y. 1976).

[33] See 53 Comp. Gen. 638, 643-645 (1974); 39 Comp. Gen. 133, 138-139 (1959), overruled in part on other grounds, 59 Comp. Gen. 313 (1980); Comp. Gen. Dec. B-139703 (June 19, 1975) (reaffirming 53 Comp. Gen. 638 (1974)).

[34] See *United States Marshals Service* v. *Means*, 741 F.2d at 1064 (McMillian, J., concurring in part and dissenting in part); but see *id.* at 1060-1061 (Gibson, J., concurring separately).

Crim. P. 17(b) and that collateral habeas corpus and Section 2255 proceedings, while technically civil, are integrally related to a criminal case; at the same time, however, Congress recognized that in other situations there is no "basis to charge the United States with witness costs in civil proceedings." H.R. Rep. 56, 89th Cong., 1st Sess. 3 (1965), citing 39 Comp. Gen. 133 (1959); see also S. Rep. 615, 89th Cong., 1st Sess. 3 (1965). This legislative history, and the absence of a comparable provision authorizing such payment in civil suits generally, strongly reinforces the conclusion that the United States is not liable for the witness expenses of a plaintiff proceeding in forma pauperis in an action under 42 U.S.C. 1983.

Holding unsuccessful in forma pauperis plaintiffs responsible for their witness expenses provides a measure of accountability in the litigation process. Otherwise,

> persons granted leave to proceed in forma pauperis have virtually "nothing to lose and everything to gain," and the purpose of § 1915—equal access for the poor and the rich—is distorted. Non-indigents who contemplate litigation are routinely forced to decide whether their claim is "worth it." We see no reason to treat indigents differently in this respect.

Harris v. *Forsyth*, 742 F.2d at 1278, quoting *Flint* v. *Haynes*, 651 F.2d at 973 (footnotes omitted). Especially in view of the inherent temptations for prisoners to seek to be brought to court (see pages 12-13 note 6, *supra*), this is a salutary and appropriate restraint in connection with the ever-increasing number of inmate actions.

We recognize, of course, that requiring indigent plaintiffs to reimburse the state custodian for a portion of its transportation costs will prove to be of little practical benefit to the state in some cases. But that will not always be so. For example, if the plaintiff prevails in the civil rights suit, he can use his damages award to pay the portion of the expenses that are allocated to him and not taxed to the losing defendant. Even if the plaintiff does

not prevail in the litigation, the state will have a claim to any funds he may subsequently obtain. To the extent that the state is nevertheless unable to collect reimbursement for the plaintiff's share of the transportation expenses, that burden must be borne as part of its public duty as custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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